No. 82-1096

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1982

Zinger Construction Company, Inc.,

Petitioner-Plaintiff,

v.

The United States,

Respondent-Defendant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FORMER U.S. COURT OF CLAIMS
(Docket No. 122-82C)

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QUESTIONS PRESENTED FOR REVIEW

1. Is the the former U.S. Court of Claims' judgment dismissing Petitioner's ("Zinger") suit grounded on 28 U.S.C. Sec. 2501 or laches?

2. If Question 1 is answered "laches," did former Court of Claims' Rule 178, "Motion For Summary Affirmance or to Dismiss the Appeal," which stated categories in which dismissals can be granted prior to Answer, include laches?

3. Was Zinger's failure to invoice for $100 of the amount due it suffictent notification to Respondent ("Government") that a claim was being asserted against it in response to which its Contracting Officer should have issued an adequate decision under the the then Disputes' clause of the contract in question?

4. Does the former Court of Claims' treatment of Zinger fit into a context of anti-contractor attitudes of Federal contracting agencies, courts and Congress chilling to contractors in the event that the nation should ever find it imperative to institute defense mobilization?

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REFERENCES TO REPORTS OF OPINIONS DELIVERED IN COURT AND BOARD BELOW

The opinion of the U.S. Court of Claims, *Zinger Construction Company, v. United States,* Ct.Cl. , F.2d , Aug. 27, 1982 (Docket No. 122-82C (A2), on Motion for Rehearing, Ct.Cl. , F.2d , Sept. 30, 1982 (A) and the opinion of the Postal Service Board of Contract Appeals, *Appeal of Zinger Construction Company,* PSBCA No. 448, 79-2 BCA Par. 14,181 (A5), are reproduced in the Appendix, as indicated.

STATEMENT OF GROUNDS OF JURISDICTION OF THIS COURT

The judgment dismissing Zinger's Petition to the former Court of Claims was on Aug. 27, 1982. Denial of Rehearing was on Sept. 30, 1982 (the day the former U.S. Court of Claims went out of existence).

Jurisdiction of this Court to review such judgment is conferred by 28 U.S.C. Sec. 1255(1).

STATUTES, REGULATIONS AND RULES WHICH THE CASE INVOLVES

Title 28, United States Code

Sec. 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. . . .

Federal Procurement Regulation

41 Code of Federal Regulations Sec. 1-16.101-32
(U.S. Standard Form 32)

2. Changes

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of

the following: (i) Drawings, designs, or specifications, where the supplies are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed..

Court of Claims Rules

Rule 178. Motion For Summary Affirmance or to Dismiss the Appeal

In lieu of including such grounds in its brief [sic], at any time prior to the filing of such brief, the respondent may move for summary affirmance or to dismiss the appeal (as the case may be) on the grounds (but only on such grounds) of lack of jurisdiction of the subject matter or person; the bar of the statute of limitations; failure to exhaust administrative remedies; res judicata; or payment, accord and satisfaction, or release, subsequent to the administrative decision; but such motion shall not suspend or delay the proceedings. However, the respondent may accompany such motion by a motion to suspend or delay the proceedings. A motion for summary affirmance or to dismiss an appeal shall be treated as a dispositive motion.

STATEMENT OF THE CASE

Jurisdiction of the former Court of Claims was conferred by 28 U.S.C. Sec. 1491 and by 41 U.S.C. Secs. 321 and 322.

Contract No. 6-1-02512 was awarded to Zinger by the former U.S. Post Office Department on June 30, 1966, and required prefabrication of Self Service Postal Units ("SSPUs") and their erection in seven locations of Philadelphia Region X of the Post Office at a total cost of $66,500. 79-2 BCA pp69,780, 69,781. On the same day, Contract No. 6-1-02513 was awarded to Zinger to so provide SSPUs in 15 locations of Washington, D.C., Region XIV at a total contract price of $77,600. *Ibid.*

One geographic location of Contract 2512 was changed and seven geographic locations of Contract 2513 were changed at the direction of the Government. *Ibid.*

An original Orange, N.J., location became Camillus, N.Y., and six of the Washington, D.C., locations were changed to locations in Alabama, Florida, Michigan and Falls Church, Va. *Ibid.*

Payments associated with the delays were made to Zinger, but delay costs were not paid. See 79-2 BCA p69-784 par. 36. By letter to the Contracting Officer of May 29, 1967, Zinger stated that it had a claim for delays and damages under both contracts 2512 and 2513. *Ibid.* In reply to said letter, the Contracting Officer on June 1, 1967, said that the claim could only apply to contract 2512. 79-2 BCA p69,784 par. 37. On Sept. 13, 1967, the Contracting Officer treated Zinger's May 29, 1967 letter, an earlier letter from it, three subsequent letters and a Sept. 13. 1967 telephone call and took the position that all costs involved in the delay and relocation of the SSPUs had been included in contract amendments ments. 79-2 BCA p69,785 pa.. 43.

Zinger never submitted a voucher for final payment under Contract 2512; final payment under contract 2513 in August 1967, at a time when Zinger had outstanding a claim for delay costs. 79-2 BCA p69,785 par. 46; see 79-2 BCA p69,785 par. 43.

Zinger submitted a claim on July 25, 1977 under the Changes clause for delay related costs. 79-2 BCA p69,786 par. 49. Relying on the Sept. 13, 1967, letter, the now Postal Service denied Zinger's claim on Nov. 7, 1977. *Ibid*, par. 50. A series of letters were exchanged with the Postal Service on Nov. 10, 1977, alleging that the Sept. 13, 1967, letter had been a final decision under the Disputes clause (although it lacked language required by regulation to be included in all final decisions under the Disputes clause) and Zinger treating a refusal to issue another letter as appealable under the Disputes clause. *Ibid*, pars. 50, 51. The notice of appeal was dated Dec. 10, 1977.

The appeal was heard in New York City on Jan. 18, 1979 during which Zinger's President, Mr. Zinger, and a a Postal Service Inspector and Auditor, Harold Schneiderman, testified, as did Mr. Cahill and Mr Letts of the Postal Service. Trial Transcript, consisting of 171 pages. See All

The Board's opinion adopts an audit report prepared by Mr. Schneiderman, which criticized Zinger for not retaining cancelled checks, payroll tax formsand cancelled checks for the years 1966. 79-2 BCA p69,786 par. 55. Zinger's books of account, reflecting the checks number by number and which were kept in the regular course of business, were examined by by Mr. Schneiderman, ~~who did not question their authenticity at trial.~~ A

Zinger's claim was predicated on a "jury verdict" presentation. 79-2 BCA p69,787 par. 59. The PSBCA's rejection of Zinger's claim was predicated on Mr. Scheiderman's testimony and report. 79-2 BCA p69,788 par. 64. The presiding administrative judge had blocked Zinger from showing that Mr. Schneiderman's testimony and report were the product of his prejudice against the "jury verdict" approach, even though it is regularly used by Boards of Contract Appeals. A17. Also, Mr. Schneiderman testified that he could support allowance of a claim using Mr. Zinger's books of account and Small Business 1120-S Tax Returns. A17-18. The 1120-S Forms are referred to in his audit report. A19-20.

Zinger petitioned the former U.S. Court of Claims for review under the Wunderlich Act, 41 U.S.C. Secs. 321 and 322 and was met by a motion to dismiss predicated on 28 U.S.C. Sec. 2501. Said motion was granted. A2.

REASONS FOR GRANTING WRIT

The Court of Claims Opinion, A2, states Zinger's reliance on Nager Electric Co. v. United States, 177 Ct. Cl. 234, 368 F.2d 846 (1966) for the proposition that 28 U.S.C. Sec. 2501's six-year statute of limitations does not begin to run until the Board of Contract Appeals has rendered its decision. (A3).

The opinion states that Nager was predicated on the fact that a contractor had to exhaust its administrative remedy before it could seek judicial review and then goes on to say that the ratonale has little application where a contractor does not pursue its remedy its remedy. (A3)

The other side of the coin is an expectation by the Court of Claims of frantic activity by contractors before BCAs such that missing a 30-day from docketing period for filing of a Complaint pleading or serving answers to interrogatories in fear that 28 U.S.C. Sec. 2501 is otherwise going to start to run. Maybe the term "exhaustion of administrative remedies" will become "zooming through administrative remedies" or a matching of government delays with contractor delays so that the contractor delays can never be found to have exceeded the government delays.

The Court of Claims quotes, at A3, a "warning" from Nager but did not seem to appreciate the following language of its quotation:

> Neither this court nor the administrative panels have had any great difficulty in handling belated claims by contractors under the various-contract adjustment articles.

The Court seems not to have been aware that under the "Changes" clause, 3 supra,

> the Contracting Officer, if he decides that the facts justify such action [consideration after 30 days from the date of receipt by the Contractor of the notification of change] may receive and act upon such claim asserted at any time prior to final payment under this contract.

Under Contract 2512, there was no final payment, A11 par. 49, and under both Contracts 2512 and 2513, claims

were at least made before final payment.

The other members of the Court of Claims panel may have taken comfort that Judge Davis, the author of Nager, by concurring showed agreement by him that in 1966 he had prophesized the result in the 1982 Zinger case. Rather, Zinger submits, the 1966 Judge Davis was saying that the con contract-adjustment clauses were handling the problem. Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537 (1940), referred to in the quotation involved a 1918 World War I contract—which did not include a pre-1978 Disputes clause at a time when Contracting Officers did not yet exist—that had changed management by March 4, 1940.

The best that can be said for the Nager warning is that the Court of Claims would step in and apply laches.

More importantly, the Court of Claims seems to have been unaware that the Boards of Contract Appeals do not regard themselves as bound by an Statutes of Limitations. Their former 30-day appeal periods tended to keep them away from 2,190-day (365 x 6) Statutes of Limitations.

Furthermore, it was not until 1966 that the government in contract cases was brought under any Statute of Limitations. 28 U.S.C. Sec. 2415. To this day, Boards of Contract Appeals do not apply 28 U.S.C. Sec. 2415 to decisions of Contracting Officers under the Disputes clause asserting claims in behalf of the government.

> The language in the legislative history of the statute and the holding of the Supreme Court quoted above [*Crown Coat Front v. United States*, 386 U.S. 503 (1967)] lead us to conclude that the statute of limitations set out in Section 2415 is a limitation with respect to proceedings not before this Board.
>
> *Appeal of Wide World Tankers*, ASBCA No. 20903, 77-1 BCA Par. 12302 at p59,265. 1/

1. Board of Contract Appeals Decisions is a series of Advance Shhets and Bound Volumes going back to the last half of 1956 and published by Commerce Clearing House.

The principal reason 28 U.S.C. Sec. 2415 was not imposed posed upon the government at the level of the BCAs was that statutes of limitations are not imposed upon contractors at the level of the BCAs.

> The defense that the nine new claims belatedly presented three years after substantial performance and appealed more than six years after the incurrence of the costs they seek to recover, are time barred by the six year Statute of Limitations, is not well grounded. That Statute(28 USCA 2501) relates solely to petitions filed [in] the United States Court of Claims, and does not begin to run until the disputes procedures afforded by the contract are exhausted. [citing *Crown Coat* and *Nager*]. There are no statutory limitations to the filing of claims and appeals for administrative adjudication by contracting officers and appellate boards.
>
> *Appeal of Frances Van Wagner,*
> ASBCA No. 11880, 67-2 BCA
> Par. 6686, at p31,021

> Looking to the statute [28 U.S.C. 2501] it is clear that it applies only to court actions against the Government and not to administrative determinations of claims. There exists as to the latter no statute of limitations and the application to their prosecution of the doctrine of laches is at best limited. [citing *Crown Coat* and *Nager*] In fine, as to the application, the U.S. Supreme Court held in *Crown Coat, supra,* that in contemplation of the statute, the right to bring a civil action accrued only when a Contract Appeals Board has finally ruled on a claim, where an appeal to such Board lies and is taken.
>
> *Appeal of Philco-Ford, Inc.*
> ASBCA No. 14251, 70-2 BCA
> Par. 8499, at p39,514.

Both Van Wagner and Philco-Ford are quoted in World Wide at 77-1 BCA p59,264.

Accordingly, the Court of Claims, in the subject Zinger case held that a port for exercise of its insistence on exhaustion of administrative remedies, the BCAs, is powerless to ignore Statutes of Limitations, which do not expressly embrace them.

41 U.S.C. Secs. 321 and 322 state that the decision of a Board of Contract Appeals is not final, if any of limited criteria are found by a court of competent jurisdiction not to exist..

In this posture, Zinger submits that the period of limitations applicable to it was six years from the date of the decision of the Postal Service Board of Contract Appeals.

The Court of Claims Judgment Was Based on Laches

The immediately preceding discussion leaves the Court of Claims with only a second ground of laches.

It found that the government and itself could not address the case properly because of the destruction of relevant documents. A 4. Mr. Schneiderman's testimony was not that the lack of the documents made impossible determination of an equitable adjustment. A17-18, see A18-19.

The Court of Claims did not dispose of the case on the merits. Mr. Zinger has advised his attorney that not only were Check Numbers reflected in his Cash Disbursements ledger but that he had the check stubs and the same were shown to Mr. Schneiderman. Futhermore, the PSBCA blocked Zinger from questioning Mr. Schneiderman–whose position, in toto, was adopted by the PSBCA–as to prejudice by him against use of the "jury verdict" method regularly used by BCAs. A16-17.

The prejudice was so bad that the Government was unable to call a witness, Mr. Cahill, who attended the preaward survey of Mr. Zinger and recalled it or that the government had lost documents. Tr. 120, 170.

These matters rebut the Court of Claims' statement that it and the government cannot address the case, A4, and suggest that the Court was really trying to avoid considering Mr. Schneiderman's possibility of bias against a method of computing equitable adjustments.

Laches Was Not Embraced In The Rule of the Former Court of Claims, Rule 178 "Motion . . . to Dismiss The Appeal, " Under Which Zinger's Case Was Dismissed

Rule 178 of the former Court of Claims, 2 supra, does not include laches as a stated ground. Was the former Court of Claims saying that laches and and an express statute of limitations are the same? Its rule said "but only on such grounds." Zinger submits that a defense of laches both requires and allows an extended factual inquiry far beyond the type of inquiry into facts usually encountered when a statute of limitations is in question.

Failure to Invoice for the Full Amount of Contract is Notice to the Government That a Claim Is Either Pending or in Contemplation, in Response to Which the Government Can Invoke the Disputes Clause

Possibly the former Court of Claims believed that only a contractor can elicit issuance of a decision under the Disputes clause, possibly because when it comes to appeals only the contractor invokes the right of appeal. Failure of appeal is concurrence with the Contracting Officer on a proposition.

There may be a greater duty on a contractor to invoke the Disputes clause in relation to a claim but the difference is one of degree and, Zinger submits, such difference is not sufficient to overturn the point of view of the BCAs, as opposed as it is to the Court of Claims holding in the subject Zinger case.

The Decision of the Former Court of Claims Fits into a Context of Anti-Contractor Attitudes of Federal Contracting Agencies, Courts and Congress Chilling to Contractors Possibly in the Event That the Nation Should ever Find It Necessary to Institute Defense Mobilization

The fact that the subject Zinger case was an attempted appeal from the Postal Service BCA does not mean that it could not have any affect on relationships of contractors with the Defense Department. The case involves law applic-

able to all Federal contracts. Courts are receiving cases involving all Federal agencies.

In Appeal of Gramercy Corporation, ASBCA No. 17830, 77-2 BCA Par. 12,589, the ASBCA expressed annoyance at being asked to readopt a policy of the Second World War that contracts were not to be terminated for default for technical defaults, which the government would have ignored if the requirement for product under a contract no longer existed. 77-2 BCA p61,013. Such policy was adopted to encourage contractors to participate in the then war effort.

In the adoption of the Contract Disputes Act of 1978, 41 U.S.C. Sec. 601, et seq., at the behest of Admiral Rickover, Congress went out of its way to include a "Fraudulent Claims" section, 41 U.S.C. Sec. 604, whose subject matter was amply covered under existing Title 18 sections.

At a regional seminar of the American Bar Association in New York in December, 1966, [illegible] stated that head of CIT had become so angered by treatment of the Assignment of Claims Act of 1940 as it related to an assignment to his company that he said, "If they have another war, let them find someone else to finance it." In the early 1970s, the former Court of Claims countenanced government employees allowing a contractor to withdraw invoices submitted by an assignee, after receiving them from the contractor, to the financial harm of the assignee.

Zinger recognizes that this Court cannot seriously entertain every, even deserving, matter, that comes before it. If the matter involved private individuals, there would be no real hope for this case to receive serious consideration. It is not the fact that the Court of Claims decided a case against Zinger, it is the fact of how it was decided. The opinion of the Court of Claims is emotional (as are parts of this Petition) but a Court should want to follow, most of all, the rules it has adopted for itself. The Court of Claims cut corners confident that Zinger would never petition this Court and even more confident that if he did, this Court would deny Certiorari

The Court did not realize that its action was communicating an attitude of hostility to contractors and an unwillingness to delve deeply into their cases, unless some atrocity needs correction. If the Federal government wants contractors to do business with it, it must recognize that it will have to provide a credible forum for hearing, not merely listening to disputes.

Possibly, Zinger does not have equity, or at least eager, equity on its side—but the foregoing has shown that the law is on Zinger's side. A completely favorable factual setting is the rarity that does not allow the Court reach a wide enough audience for its opinion to affect enough of the nation.

A decision on the law of this case is important to the Federal contracts community—the BCAs and the former Court of Claims being in rebellion against each other—but even more important would such an opinion be to the right attitudes within that community. It has been said that the Fourth Branch of Government is not the Press but is the reliance that is placed on contractors.

The fear is that contractors might hesitate in the event of defense mobilization—and ask for fairer contract terms—and that such hesitation could cause a loss of a quick war.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD ISSUE AND THE COURT SHOULD ACCEPT THE CASE FOR ARGUMENT OR SHOULD SUMMARILY REVERSE THE FORMER COURT OF CLAIMS

Dated: New York, N.Y.
December 28, 1982

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